FLYGLOBAL CHARTER SDN BHD v. ALFAJR TRAVEL & TOURS SDN BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SURAYA OTHMAN JCA
LEE HENG CHEONG JCA
GHAZALI CHA JCA
[CIVIL APPEAL NOS: B-02(NCvC)(W)-1135-06-2021
& B-02(NCvC)(W)-1173-06-2021]
30 DECEMBER 2022

Abstract – *Arising from agreements and a letter of undertaking ('LOU') entered into between the parties, the travel agency is to charter aircrafts from the international charter airline and wet-lease operator. The travel agency's failure to do so while utilising scheduled commercial flights operated by other commercial airlines constituted breach of the LOU and is therefore liable to pay damages to the aggrieved party that suffered losses.*

CONTRACT: *Agreement – Letter of undertaking ('LOU') – Breach – Contractual relationship between parties – Terms and conditions of all agreements entered into – Agreement for travel agency to charter flights from international charter airline for Umrah flights – Travel agency utilised commercial airline flights instead – Failure to fulfil obligations – Whether there was a breach of LOU – Whether international charter airline suffered losses and has right to claim under LOU – Whether claim for damages allowed*

CONTRACT: *Agreement – Letter of undertaking ('LOU') – Breach – Contractual relationship between parties – Terms and conditions of all agreements entered into – Agreement for travel agency to charter flights from international charter airline for Umrah flights – Travel agency utilised commercial airline flights instead – Failure to fulfil obligations – Whether there was breach of LOU – Whether travel agency's claims for payment for expenses incurred without basis – Whether counterclaim ought to be dismissed*

There were two appeals arising from the same High Court decision before this court, which were heard together, namely: (i) Appeal No. 1135 which was an appeal filed by the plaintiff against the High Court's decision dismissing its claim; and (ii) Appeal No. 1173, an appeal filed by the defendant against the same High Court decision for dismissing the defendant's counterclaim. The plaintiff was an international charter airline and wet-lease operator whilst the defendant was a travel agency. There existed several agreements between the parties: (i) tripartite ticket sales agreement ('tripartite agreement') which was executed between the plaintiff, defendant and NESMA Airlines Company Ltd, a company duly established

and registered in the Kingdom of Saudi Arabia ('NESMA'); and (ii) pursuant to the execution of the tripartite agreement, the plaintiff and NESMA executed the aircraft ACMI agreement ('ACMI agreement'). In this agreement, NESMA was the lessee and the plaintiff was the lessor. The plaintiff and defendant then entered into an agreement ('charter rental agreement'), whereby both the plaintiff and defendant agreed that NESMA would lease the aircrafts from the plaintiff while the defendant would then charter the aircrafts from NESMA. In the charter rental agreement, the defendant further agreed to pay, directly to the plaintiff, a sum of USD6,300 per block hour with a minimum guaranteed payment of 275 block hours per month during the charter term, *ie,* 15 November 2017 to 28 February 2018. The defendant also agreed to pay the charter rental, two weeks in advance of the scheduled flights. Subsequent to the charter rental agreement, a 'Side Letter' was executed by both the plaintiff and defendant ('side letter') in which the defendant agreed and confirmed that the defendant would pay all payments due under the ACMI agreement. Further, *vide* a deed of indemnity, which the plaintiff, defendant and NESMA executed, the defendant agreed to indemnify NESMA against any claim made by the plaintiff under the ACMI agreement for payment of the charter rental or any other payment which was the responsibility of the defendant under the charter rental agreement. Arising from the agreements, a total of 13 departures/flights were successfully carried out during the Umrah period and the plaintiff issued various tax invoices to the defendant for the ACMI agreement lease and block hour payments. Arising from the defendant's failure to make full payments in respect of the tax invoices issued by the plaintiff, the plaintiff issued a statutory demand under s. 466 of the Companies Act 2016 demanding for the outstanding amount of USD1,683,513.04. The defendant issued a letter to the plaintiff raising the issue of non-Extended Operation Certification ('ETOPS') and contended that due to the plaintiff's failure to inform about the non-ETOPS certificate, the defendant incurred losses for the said 13 departures/flights due to the additional costs of extra flying hours and fuel usage in a sum of USD297,750. The defendant, subsequently, lodged a complaint to the Malaysian Aviation Commission ('MAVCOM') and the Department of Civil Aviation ('DCA'). Following this, the defendant met with the plaintiff and pursuant to the meeting, a letter of undertaking ('LOU') containing the revised terms was executed by the parties. Upon execution of the LOU, the defendant confirmed that, in consideration of the defendant's payment of USD87,990 to the plaintiff, all parties would drop and/or withdraw the pending legal suits and/or complaints made against each other to the relevant authorities with immediate effect. The plaintiff then contended that the defendant breached the LOU when the defendant failed to withdraw its complaints to MAVCOM and DCA and by not fulfilling its obligations. The plaintiff issued a letter of demand claiming for all sums due under the LOU, in the sum of USD5,946,000. Since the

defendant had failed, neglected and omitted to reply to the plaintiff's letter of demand and failed to pay the sum demanded, the plaintiff filed this suit at the High Court. The defendant, in response, filed a defence and counterclaim against the plaintiff on the grounds that it had lost its business income, incurred additional costs to purchase flight tickets with other flight operators, and incurred additional costs for promotion and advertisement. After a full trial and arriving at its decision to dismiss the plaintiff's claim and the defendant's counterclaim, the High Court Judge ('HCJ') *inter alia* stated (i) that the only issue to be decided was whether there was a breach of the LOU by either party; (ii) that the plaintiff had failed to respond to the defendant's proposed flight schedule and as such, the plaintiff lost its right to claim under LOU; and (iii) that the plaintiff was not ready and available to fly pursuant to the defendant's proposed flight schedule. On the defendant's counterclaim, the HCJ held that, *inter alia*, the defendant failed to plead their cause of action and failed to adduce evidence to prove its claim of USD6,582,000 when the defendant's own evidence showed that a sum of RM1,618,275 was due. Both the plaintiff and the defendant were aggrieved by the decision of the HCJ and appealed to this court.

Held (allowing plaintiff's appeal; dismissing defendant's appeal)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The contractual relationship between the parties were not only confined to the terms of the LOU but were also covered by the pertinent terms and conditions in the agreements which included a crucial third party, namely, NESMA. The HCJ was thus wrong to confine his consideration of the plaintiff's case within the four corners of the LOU, in coming to his decision to dismiss the plaintiff's claim. The HCJ did not judicially consider all other relevant evidence such as the terms and conditions of the agreements and the rile and involvement of the three parties, namely, the plaintiff, the defendant and NESMA in the whole arrangement and not just the plaintiff and the defendant. (paras 23-25)

(2) Pursuant to the agreements, NESMA was the approving and confirming authority for any fight schedule and once NESMA confirmed the flight schedule, NESMA then will instruct the plaintiff to implement the flight schedule. Thus, in essence, the plaintiff only received instructions from NESMA on flight schedules and not from the defendant. Evidence in the form of emails showed that NESMA approved and confirmed the flight schedules and it was only upon confirmation that NESMA would instruct the plaintiff to implement the schedules. Thus, the plaintiff only received instructions from NESMA and not from the defendant. From evidence adduced, the defendant's action in sending flight schedules to SD2 only on 5 February 2018, 12 February 2018 and 22 February 2018 respectively to confirm the flight schedules was wrong, *mala fide* and

improper due to the following reasons (i) the defendant sent the emails to SD2 only and not to NESMA, which was the approving and confirming authority, and/or to the plaintiff's other officers in charge; and (ii) even if the plaintiff had knowledge of the said emails, the defendant failed to prove that it was the plaintiff's duty and/or obligation to confirm the defendant's flight schedule, not NESMA. (paras 31, 34 & 37)

(3) Arising from the agreements and LOU, the contractual agreement was that the defendant would charter the aircraft from NESMA but will make payments for the charter directly to the plaintiff. Under this arrangement, the defendant must inform NESMA about the proposed flights and NESMA, in turn, would instruct the plaintiff to operate the aircraft accordingly. From the evidence adduced, the defendant did not instruct NESMA about its flight schedules and in turn NESMA did not instruct the plaintiff for the proposed flights. The reason why the defendant did not instruct NESMA about the proposed flights was because the defendant did not have sufficient passengers for such flights. In such situation, it would not be commercially viable for the defendant to charter the plaintiff's aircraft on terms as stipulated in the LOU. The defendant did not send any flight schedules to NESMA, but instead the defendant utilised the scheduled commercial flights operated by AirAsia and MAS, which was commercially viable for the defendant, as the defendant did not have sufficient passengers to charter the aircraft. The defendant had breached the LOU, in not resuming the Umrah flight as agreed in the LOU. (paras 41-44)

(4) Due to the defendant's failure to charter the flights under the LOU, the plaintiff had proved its losses of revenue in the sum of USD5,946,000. The defendant had no intention of resuming the chartering of the Umrah flights, which was why the defendant did not send the flight schedules to NESMA. The defendant intentionally did not charter the plaintiff's aircraft for the Umrah from March 2018 to May 2018, to make more profits as tickets with MAS and/or AirAsia was far cheaper than chartering the plaintiff's flights. The plaintiff had proved its losses on a balance of probabilities, arising from the defendant's breach of the LOU. The plaintiff was not able to conduct any other businesses since the plaintiff's aircrafts were under the NESMA's Ops Specs. The plaintiff also had to bear the monthly fixed costs for its aircraft, crew, maintenance, insurance, flight operation, ground operation and operating expenses even though the aircrafts were not operating. The plaintiff had also proved its losses, on a balance of probabilities, by adducing documentary and oral testimony to prove that the plaintiff, at all material times, was ready and able to conduct the Umrah flight. Arising from the defendant's breach, the plaintiff had suffered losses

because the plaintiff could not enter into any other business contract as the plaintiff's AOC was registered under NESMA, and the plaintiff could not fly its aircraft until the end of the LOU. (paras 53-56)

(5) As for the defendant's counterclaim against the plaintiff, the defendant had failed to plead its cause of action and further failed to plead the basis of its claims. The defendant merely pleaded that the defendant suffered losses due to the plaintiff's inability to conduct the flights. The plaintiff, on the other hand, had adduced substantial evidence to prove that the plaintiff was able and ready to conduct the Umrah flights. The defendant failed to comply with the terms of the LOU, to charter aircrafts for Umrah flights, but the defendant secured seats with AirAsia or other commercial airlines. The defendant had only incurred a cost of RM1,618,275 in bulk purchases for commercial flights, whereas if the defendant were to charter the Umrah flight from the plaintiff, it would have paid a sum of USD5,946,000. The difference between the costs paid by the defendant for commercial flights and the cost it would have incurred if the defendant were to charter Umrah flights from the plaintiff was immense. Since the defendant had secured seats on the commercial flights from March 2018 to May 2018, the defendant did not suffer any losses. The defendant's claim of USD6,682,000 was not supported by any credible evidence especially documentary evidence. (paras 58-63)

(6) The various documents such as payment vouchers, invoices and bills produced by the defendant in support of their counterclaim were incurred before the execution of the LOU. The said advertisements, banners and hi-tea conducted to promote the Umrah flights were carried out, based on the earlier agreement between NESMA and the defendant. The plaintiff operated the Umrah flights up until December 2017. Thus, the defendant's claim for the payments for various expenses which were incurred before the execution of the LOU, was wrong, incorrect and without basis. Since the defendant's counterclaim was grounded on the plaintiff's breach of the LOU and in the light of the earlier finding that the plaintiff was not in breach of the LOU but the defendant, the defendant's counterclaim must fail. (paras 64-66)

Case(s) referred to:
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Legislation referred to:
Companies Act 2016, s. 466

For the plaintiff - Ravichandaran Selliah & Tharuny Palanisamy; M/s S Ravichandaran & Anuar
For the defendant - Mohammed Azwan Md Arif; M/s Noor Hanani & Co

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: BA-22NCvC-359-07-2018 (overruled in part).]

Reported by Suhainah Wahiduddin

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JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] There are two appeals arising from the same High Court's decision before this court, which were heard together, namely:

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(i) Appeal No: B-02(NCvC)(W)-1135-06-2021 ("Appeal No. 1135"), an appeal filed by the appellant/plaintiff against the High Court's decision for dismissing the appellant/plaintiff's claim; and

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(ii) Appeal No: B-02(NCvC)(W)-1173-06-2021 ("Appeal No. 1173"), an appeal filed by the appellant/defendant against the same High Court's decision for dismissing the appellant/defendant's counterclaim.

[2] For convenience, parties will be referred to, as they were in the High Court.

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Background

[3] The plaintiff is an international charter airline and wet-lease operator based in Kuala Lumpur, whilst the defendant is a travel agency.

[4] There existed several agreements between the parties, namely:

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(i) Tripartite Ticket Sales Agreement dated 26 September 2017 (the "Tripartite Agreement") which was executed between the plaintiff, defendant and Nesma Airlines Company Ltd, a company duly established and registered in the Kingdom of Saudi Arabia ("NESMA").

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(ii) Pursuant to the execution of the Tripartite Agreement, the plaintiff and NESMA executed the Aircraft ACMI Agreement on 17 October 2017 (the "ACMI Agreement"). In this agreement, NESMA is the 'lessee' and the plaintiff is the 'lessor'.

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(iii) The plaintiff and defendant then entered into an agreement on 13 October 2017 (the "Charter Rental Agreement"), whereby both the plaintiff and defendant agreed that NESMA would lease the aircrafts from the plaintiff while the defendant would then charter the aircrafts from NESMA. In the Charter Rental Agreement, the defendant further agreed to pay, directly to the plaintiff, a sum of USD6,300 per block hour with a minimum guaranteed payment of 275 block hours per month during the charter term, *ie*, 15 November 2017 to 28 February 2018. The defendant also agreed to pay the charter rental, two weeks in advance of the scheduled flights.

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(iv) Subsequent to the Charter Rental Agreement, a "side letter" was executed by both the plaintiff and defendant on 20 October 2017 (the "side letter") in which the defendant agreed and confirmed that the defendant would pay all payments due under the ACMI Agreement.

(v) Further, *vide* a deed of indemnity, which the plaintiff, defendant and NESMA executed on 22 October 2017, the defendant agreed to indemnify NESMA against any claim made by the plaintiff under the ACMI Agreement for payment of the charter rental or any other payment which is the responsibility of the defendant under the Charter Rental Agreement.

(vi) A joint procedures manual was executed between the plaintiff and NESMA on 23 November 2017. (All the above agreements, Deed of Indemnity and Joint Procedures Manual are collectively referred to as "the agreements").

[5] Arising from the agreements, a total of 13 departures/flights were successfully carried out during the Umrah period and the plaintiff issued various tax invoices to the defendant for the ACMI Agreement lease and block hour payments.

[6] Arising from the defendant's failure to make full payments in respect of the tax invoices issued by the plaintiff, the plaintiff issued a statutory demand dated 16 January 2018 under s. 466 of the Companies Act 2016, demanding for the outstanding amount of USD1,683,513.04 as at 31 December 2017.

[7] On 16 January 2018, the defendant issued a letter to the plaintiff raising the issue of non-Extended Operation Certification ("ETOPS") and contended that due to the plaintiff's failure to inform about the non-ETOPS certificate, the defendant incurred losses for the said 13 departures/flights due to the additional cost of extra flying hours and fuel usage in a sum of USD297,750. The defendant, subsequently lodged a complaint to the Malaysian Aviation Commission ("MAVCOM") and the Department of Civil Aviation ("DCA").

[8] Following this, the defendant met with the plaintiff and pursuant to the meeting, a letter of undertaking (the said "LOU") containing the revised terms was executed on 26 January 2018 by both parties. The defendant, *vide* the said LOU, undertook with the plaintiff as follows:

> We refer to our discussion between Flyglobal Charter and Alfajr Travel taken place on 26/01/2018 at Flyglobal Charter headquarters in Kuala Lumpur, we hereby fully agreed to undertake and resume the Umrah flights operations between KUL-JED/JED-KUL and starting the flights between CGK-JED/JED-CGK on full charter basis with immediate effect. The details of flights as follow:
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> **KUL-JED-KUL**
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> | | |
> |---|---|
> | Number of Flights: | 3 x monthly |
> | Lease Rate: | USD250,000 per return Flights |
> | Seat Capacity: | 400 seats |

	Load Factor Commitment:	100% load factor
	Payment terms:	5 (five) working days advance payment (full amount)
	Tentative Start Date:	10th February 2018
	Tentative End Date:	31st May 2018
	KUL-CGK-KUL	
	Number of Flights:	4 x monthly
	Lease Rate:	USD308,000 per return Flights
	Seat Capacity:	400 seats
	Load Factor Commitment:	100% load factor
	Payment terms:	5 (five) working days advance payment (full amount)
	Tentative Start Date:	10th February 2018
	Tentative End Date:	31st May 2018

Alfajr Travel also agreed to make full payment of all the outstanding amounts to Flyglobal Charter on next banking day upon acceptance of this letter of undertaking by Flyglobal Charter. The total outstanding amount based on the last invoice from Flyglobal dated on 29th December 2017 is as follows:

Balance due for hours flown	$ 19,285.54
Outstanding from World Fuel	$ 68,705.45
Nett Outstanding Balance as at 26/1/18	$ 87,990.99

To ensure the mutual benefit for both parties and business continuity, Alfajr Travel agreed to drop all the legal charges and complaints to authority that it has taken against Flyglobal Charter with immediate effect and requesting Flyglobal to do the same.

[9] Upon execution of the LOU, the defendant *vide* their letter dated 5 February 2018 confirmed that, in consideration of the defendant's payment of USD87,990.99 to the plaintiff, all parties would drop and/or withdraw the pending legal suits and/or complaints made against each other to the relevant authorities with immediate effect.

[10] On 6 February 2018, the defendant *vide* its email enclosed the transfer of payment receipt made by NESMA to the plaintiff for the sum of USD86,990.

[11] The plaintiff then contended that the defendant breached the LOU when the defendant failed to withdraw its complaints to MAVCOM and DCA and by not fulfilling its obligations. The plaintiff issued a letter of demand dated 24 May 2018, claiming for all sums due under the LOU, in the sum of USD5,946,000 calculated as at 9 May 2018.

[12] Since the defendant had failed, neglected and omitted to reply to the plaintiff's letter of demand and failed to pay the sum demanded, the plaintiff filed this suit in the High Court claiming:

(i) the sum of USD5,946,000 being the monies due under the LOU;

(ii) that the defendant to withdraw complaints made to both the Department of Civil Aviation (DCA) and Malaysian Aviation Commission (MAVCOM); and

(iii) an order to refrain the defendant from making future complaints to the regulatory bodies in relation to the plaintiff's operation without the Extended Operation Certification (ETOPS).

[13] The defendant, in response filed a defence and counterclaim against the plaintiff on the grounds that it had lost its business income, incurred additional costs to purchase flight tickets with other flight operators, and incurred additional costs for promotion and advertisement. Thus, the defendant counterclaimed as follows:

(i) USD6,582,000 as damages for Umrah travel tickets from the month of March 2018 to May 2018;

(ii) RM46,470.96 as damages for promoting and also advertising the Umrah package;

(iii) damages for loss of its reputation and its business reputation;

(iv) damages for loss of its business income; and

(v) general damages.

Findings Of The High Court

The Plaintiff's Claim

[14] After a full trial and in arriving at its decisions to dismiss the plaintiff's claim and the defendant's counterclaim, the learned High Court Judge (learned High Court Judge") *inter alia* stated:

(i) that the only issue to be decided was whether there was a breach of the LOU by either party;

(ii) that the plaintiff had failed to respond to the defendant's proposed flight schedule and as such, the plaintiff lost its right to claim under LOU; and

(iii) that the plaintiff was not ready and available to fly pursuant to the defendant's proposed flight schedule.

Defendant's Counterclaim

[15] On the counterclaim, the learned High Court Judge held, *inter alia,* as follows:

(i) that the defendant failed to plead their cause of the action and that there is no paragraph in the statement of defence or the counterclaim that alleged that the plaintiff has breached the LOU;

(ii) that the defendant failed to adduce evidence to prove its claim of USD6,582,000 when the defendant's own evidence in the form of exh. 11 showed that a sum of only RM1,618,275 was due; and

(iii) that the defendant's claim for promotion and advertising costs which was supported by various payment vouchers and tax invoices collectively marked as exh. D12. D12 showed that a number of big payment promotion and the advertisement issued by the defendant is to promote the Umrah package before the date of the LOU when the Umrah package had already been successfully implemented and before the problem arose between the plaintiff and the defendant.

[16] Both the plaintiff and the defendant were aggrieved by the decision of the learned High Court Judge and they appealed to this court.

[17] We heard both appeals on 14 June 2022 and unanimously allowed the plaintiff's appeal and dismissed the defendant's appeal.

The Plaintiff's Contentions

[18] Before us, the plaintiff contended, *inter alia,* as follows:

(i) that the LOU did not operate independently but with all the other agreements, especially the ACMI Agreement, as NESMA played an important role in the operation of the charter flights. Thus, the learned High Court Judge erred in law and fact in deciding the plaintiff's case solely based on the LOU;

(ii) that the email dated 5 February 2018 and the follow-up emails dated 12 February 2018 and 20 February 2018 respectively were sent by SD3 to SD2 only and was not sent to other officers in charge, and also, it was not sent to NESMA, the most important party in the Tripartite Arrangement;

(iii) that the learned High Court Judge erroneously relied wholly on SD2's evidence which was not supported by any documents or other witnesses, including SD3's WhatsApp message, to find that the plaintiff was not ready and able to operate its flights without considering other available evidence;

(iv) that the learned High Court Judge also relied on exh. D10, a WhatsApp message from one Anwar Basha from NESMA sent to SP3 on 22 January 2018, *ie*, four days before the execution of the LOU. The learned High Court Judge gave undue importance to the WhatsApp message that NESMA purportedly sent to SD3 without any further corroborating evidence;

(v) that it is undisputed fact that the defendant did not take flights under the LOU. The Umrah flights under the LOU did not take place due to the defendant's failure to resume the same and that the defendant has breached the LOU;

(vi) that the defendant caused substantial loss to the plaintiff's business as the plaintiff could not conduct any other business since the plaintiff's aircraft are under the NESMA's Operation Specification (Ops Specs). The plaintiff also had to bear the monthly fixed cost for its aircraft, crew, maintenance, insurance, flight operation, ground operation and operating expenses even though the aircraft were not operating; and

(vii) that the plaintiff has proved its case on the balance of probabilities by producing documentary and oral testimony to prove that the plaintiff, at all material times, was ready and able to conduct the Umrah flight.

The Defendant's Contentions

[19] Before us, the defendant contended, *inter alia,* as follows:

(i) the defendant then discovered that the plaintiff did not have the said ETOPS certificate for its flight operations;

(ii) that the defendant already through letter dated 16 January 2018 informed plaintiff that the defendant already bore extra expenses of USD292,750 for the 13 Umrah flights operated by the plaintiff and demanded that the plaintiff to bear the additional cost due to the failure of the plaintiff to inform the defendant that the plaintiff was operating without an ETOPS certificate;

(iii) that the defendant's complaint to the Department of Civil Aviation (DCA) was due to the plaintiff's failure to inform the defendant and NESMA of its status, that is, of not being ETOPS certified;

(iv) that the defendant had on 5 February 2018, 12 February 2018 and 22 February 2018 respectively sent the flight schedules to the plaintiff, however, it did not receive any response from the plaintiff;

(v) that the defendant had to use other flight operators to operate the defendant's flights due to the plaintiff's failure to confirm the flight schedules. Thus, the defendant had incurred additional flight ticket costs; and

(vi) that the plaintiff was not able to operate its flights since January 2018 as the plaintiff did not have permission and was prohibited from flying to Saudi Arabia.

Our Analysis

[20] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.** (emphasis added)

[21] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[22] Bearing in mind the above principles distilled from the above cases, we will now deal with the plaintiff's and defendant's appeals respectively.

Appeal No. 1135

[23] On the issue that the learned High Court Judge erred in law and fact in deciding the plaintiff's case solely based on the LOU, we are in agreement with the plaintiff's contention that the learned High Court Judge has erred in law and fact in deciding the plaintiff's case solely based on the LOU as the contractual relationship between the parties are not only confined to the terms of the LOU and covered by the pertinent terms and conditions in the agreements which included a crucial third-party, namely NESMA. The learned High Court Judge is thus wrong to confine his consideration of the plaintiff's case within the four corners of the LOU, in coming to his decision to dismiss the plaintiff's claim.

[24] A perusal of the agreements showed that the plaintiff's case would involve the application of the terms and conditions of the agreements, the LOU and the involvement of three parties namely the plaintiff, the defendant and NESMA and not just the plaintiff and the defendant.

[25] Thus, we are of the considered view that the learned High Court Judge's finding that the plaintiff's case solely based on the LOU is erroneous as it showed that learned High Court Judge did not judicially consider all other relevant evidence such as the terms and conditions of the agreements and the role and involvement of three parties namely the plaintiff, the defendant and NESMA in the whole arrangement and not just the plaintiff and the defendant.

[26] The defendant further contended that SD2 received from an email from NESMA that the aircraft has been removed from Op Specs, thus they cannot proceed with the flight schedule, sometime at end of January or early February after the signing of the LOU. SD2 also testified that unfortunately he cannot produce the particular email as he had no access to the email anymore as when he resigned from the plaintiff, he handed over his laptop to company.

[27] SD2 further stated that besides NESMA giving him, notice by email, he received a call from the then deputy CEO of NESMA, Mr Anuar Bashah, informing him about the removal of aircrafts from Ops Specs by GAKA or the Arabian Airlines Saudi. SD2 stated that he received the said phone call from Mr Anuar Bashah at around the same time when he received that email.

[28] Thus, the defendant contended that the failure of the plaintiff to inform the defendant of the status of their aircraft after the LOU was signed clearly shown that the plaintiff is actually not capable of continuing the flight according to the proposed flight schedule that has been sent by the defendant to the plaintiff.

[29] Other than mere allegations, we are of the view that the defendant failed to call or subpoena anyone from NESMA to substantiate their allegations when they could have easily call or subpoena someone from NESMA or Mr Anuar Bashah.

[30] We are of the considered view that the learned High Court Judge fell into error by placing excessive reliance on unsubstantiated evidence which could easily be substantiated by calling someone from NESMA. Further, no explanation was given as to why the defendant was not able to produce someone from NESMA to give evidence on this matter.

[31] Further, on the issue that the email dated 5 February 2018 and the follow-up emails dated 12 February 2018 and 20 February 2018 respectively which were sent by SD3 to SD2 only and not sent to any other officers in charge. The said email dated 5 February 2018 was not sent to NESMA. We are of the considered opinion that it is suspicious why that particular email was also, not sent to NESMA, which is the most significant party in the whole arrangement. Pursuant to the agreements, the role of NESMA is as follows. NESMA is the approving and confirming authority for any flight schedule, and once NESMA confirm the flight schedule, NESMA then will instruct the plaintiff to implement the flight schedule. Thus, in essence, the plaintiff only receives instruction from NESMA on flight schedules and not from the defendant.

[32] SP1, Shamini in her testimony, stated that any email pertaining to flight schedules ought to have been sent to the entire operation team and NESMA. The relevant part of the evidence of SP1 – Shamini, is reproduced for ease of reference:

> SR: *Now, the, in their defence they have stated that Flyglobal failed to provide your aircraft for this flight schedule given by Alfajr from March to May. Ok, and this is the schedule. Could you please elaborate on this?*
>
> Shamini: The schedule was sent to us by Alfajr, sent to all (11:27:44am inaudible). *Firstly, in the past, any schedule that came would have gone to our entire ops team but it was only sent to Offar, this are the circumstances. Second, Alfajr directly emailed it to Offar. We don't act on instructions from the travel agent. We act on instructions from Nesma. So what would happen normally is Nesma would email us and ask us, are you able to conduct this flight. What they mean by that is, do you have the crew ready? Now, remember my crew is sitting on the ground doing nothing, my plane is sitting on the ground doing nothing and I have a contract with them, of course I have the crew ready to leave. This was a much more, if you look at the hours, this, they didn't even meet the minimums that were in the MOU to begin with.* (emphasis added)

[33] As stated above, any emails concerning flight schedules would be sent to entire operation teams of both parties and to NESMA as was done previously and all along. The following emails will demonstrate that all emails relating to flight schedules were sent to all persons in charge of operation and flight schedules and also to NESMA namely:

(i) an email from Prafull Mishra (a representative from NESMA) on 23 November 2017, instructing the plaintiff to make arrangements to implement the flight routes prepared by NEMSA. This email was sent or copied to a number of people who were involved in the flight operation;

(ii) an email from Prafull Mishra (a representative from NESMA) on 24 November 2017 enclosing the flight schedule and requesting parties to follow the schedule to avoid any confusion or miscommunication this email was also sent to a number of people who were involved in the operation;

(iii) an email from the defendant to NESMA on 14 November 2019 enclosing the return flight schedule. This email was sent to a number of people who were involved in the operation and SD2 is one of the recipient;

(iv) an email from Marija (a representative from NESMA) on 28 November 2017 to the defendant enclosing the scheduled flights. This email was sent to a number of people who were involved in the flight operation;

(v) an email from the defendant on 10 December 2017 enclosing the planned flight schedule sent to the plaintiff's officers (Sumanraja, Ang Giap San, Shamsul Idrus, Azman Abd Majid and Earman Eza Ali) and requesting to update NESMA. This email was sent to a number of people who were involved in the flight operation; and

(vi) an email from Marija (a representative from NESMA) on 24 November 2017 informing parties that NESMA will not operate flights on 26 December 2017 and 29 December 2017 respectively. This email was sent to a number of people who were involved in the operation.

[34] We are of the considered view that the above emails showed that NESMA approved and confirmed the flight schedules, and it is only upon confirmation, that NESMA will instruct the plaintiff to implement the schedules. Thus, it is clear the plaintiff only receives instruction from NESMA and not from the defendant.

[35] Further, the testimony of SD3 showed that SD3 admitted previously that all or any flight schedules must be sent to NESMA. The relevant part of SD3's evidence is reproduced herewith for ease of reference:

MA: *So macam mana prosedur sebelum penerbangan di confirm kan, dari segi jadual, boleh Tuan Haji jelaskan?*

Osman: *Sebelum penerbangan minimum dua bulan:*

MA: Perlahan sikit.

Osman: *Pihak kami akan menghantar jadual penerbangan kepada pihak penerbangan Flyglobal dan juga penerbangan Nesma Airline untuk memastikan semuanya berada dalam mendapat trafik clearance termasuk dari segi laluan udara daripada Malaysia melintasi India biasanya dan atau Indonesia dan diikuti melintasi negara Teluk lah baru dia sampai ke Saudi.* Begitu juga saya juga yang menguruskan untuk mendapatkan kebenaran daripada DCA Malaysia untuk mendapatkan sebab kali pertama Nesma Airline datang untuk menerbangkan jemaah daripada Malaysia ya. Jadi proses itu berjalan dengan baik sehinggalah termasuklah sistem ticketing, saya juga yang mengaturkan sistem ticketing nya sekurangkurangnya satu bulan sebelum penerbangan atau minimum tiga minggu sebelum penerbangan, pihak ticketing Alfajr telah mengeluarkan tiket penerbangan kepada pihak jemaah ya. *Sebab dia ada satu sistem pihak Nesma memberi pada pihak Alfajr macam ticketing sistem Yang Arif, di situ ada password dan kita akan key in lah nama-nama jemaah dan ini melibatkan hampir 405 seat yang kita kena penuhkanlah setiap penerbangan pesawat Flyglobal tersebut, pesawat Nesma dan semuanya berjalan dengan baiklah. Saya rasa kita berjaya memenuhkan almost 80% dan ada pesawat kita yang penuh 100% pada 13 penerbangan pertama, tiada masalah dekat situ.*

MA: So bila ticketing dah selesai, jadi jadual perlu dihantar kepada siapa Tuan Haji?

Osman: *Kita dah dari dua bulan lebih awal telah menghantar jadual penerbangan, confirmation flight kepada pihak airline minimum begitu juga kepada pihak Nesma*. Jadi laluan udara itu yang penting bila ticketing dah selesai kita hanya memberi jemaah Umrah tiket-tiket tersebut dan kita hanya mengarahkan mereka untuk pergerakan mereka ke airport untuk mereka berangkat pada tarikh-tarikh yang telah ditetapkan dan seingat saya penerbangan dia sekitar pukul 05:30 petang setiap hari iaitu penerbangan daripada Kuala Lumpur ke Jeddah.

(emphasis added)

[36] From the evidence, we are of the considered view that the learned High Court Judge failed to consider SD3's evidence who had admitted that any flight schedules must be sent to NESMA and had done so in the past.

[37] Further, from the evidence adduced, it showed that the defendant's action in sending the flight schedules to SD2 only on 5 February 2018, 12 February 2018 and 22 February 2018 respectively to confirm the flight schedules is wrong, *mala fide* and improper for the following reasons:

(i) the defendant sent the said emails to SD2 only and not to NESMA which is the approving and confirming authority and/or to the plaintiff's other officers in charge;

(ii) SD2, during cross-examination, could not produce any evidence to show that he had informed the plaintiff's management of the defendant's said emails. SP1, who is the plaintiff's Chief Executive Officer, testified that the plaintiff had no knowledge of the defendant's said emails; and

(iii) even if the plaintiff had knowledge of the said emails, the defendant had failed to prove that it was the plaintiff's duty and/or obligation to confirm the defendant's flight schedule, not NESMA.

[38] We take the view that the defendant failed to give a reasonable explanation as to why they sent the flight schedules on 5 February 2018 and the follow-up emails dated 12 February 2018 and 22 February 2018 respectively only to SD2, without copying to the relevant parties contrary to customary standard operating procedure and previous practices as was previously done all the while.

[39] In fact, SP3 who is the defendant's director also admitted that it is the usual practice for the defendant to send the flight schedules to both the plaintiff and NESMA and that the contract between the plaintiff and the defendant dealt only for payment of the flights based on the Tripartite Agreement.

[40] We are of the considered view that the learned High Court Judge failed to evaluate these pieces of evidence properly or at all in coming to his finding. Instead, the learned High Court Judge relied solely on SD2's evidence which was not supported by any documents or other witnesses.

[41] In the present case, arising from the agreements and LOU, the contractual arrangement is that the defendant will charter the aircraft from NESMA but will make payments for the charter directly to the plaintiff. Under this arrangement, the defendant must inform NESMA about the proposed flights, and NESMA, in turn, will instruct the plaintiff to operate the aircraft, accordingly.

[42] From the evidence adduced, we form the considered view that the defendant did not instruct NESMA about its flight schedules and, in turn, NESMA did not instruct the plaintiff for the proposed flights. We are in agreement with the plaintiff's contention that the reason why the defendant did not instruct NESMA about the proposed flights is because the defendant did not have sufficient passengers for such flights. In such situation, it would not be commercially viable for the defendant to charter the plaintiff's aircraft on terms as stipulated in the LOU.

[43] We noted that the defendant admitted this in cross-examination. Thus, we are of the considered view that the defendant did not send any flight schedules to NESMA, but instead, the defendant utilised the scheduled commercial flights operated by AirAsia and MAS, which was commercially viable for the defendant, as the defendant did not have sufficient passenger to charter the aircraft. In this case, it has been proven that the defendant would email NESMA, their instructions pertaining to the chartering of flights in the past.

[44] From the evidence elicited, we found that the defendant has breached the LOU, in not resuming the Umrah flight as agreed in the LOU.

Whether The Plaintiff Was Able And Ready To Operate The Umrah Flights Under The LOU?

[45] The learned High Court Judge made the following finding of facts:

> [37] Beralih pula kepada dakwaan defendan berhubung dengan ketidakupayaan plaintif menyediakan kapal terbang pada masa material, perkara tersebut ada dinyatakan dalam keterangan SD2 dan SD3. **Menurut SD3, dia ada menerima pesanan 'WhatsApp' daripada NESMA bertarikh 22.2.2018 berhubung dengan perkara tersebut.** Keterangan SD3 berhubung Ops Spec kapal terbang Plaintif disokong oleh keterangan SD2. (emphasis added)

[46] We are of the view that the learned High Court Judge once again placed unwarranted reliance on SD2's testimony and SD3's WhatsApp message to conclude that the plaintiff was not ready and able to operate its flights without considering other available pertinent evidence. The relevant part of the grounds of judgment is reproduced herewith for ease of reference:

A [38] Walaupun semasa LOU ditandatangani, kapal terbang plaintif *masih dalam proses dikeluarkan* daripada Ops Spec oleh GAKA, *tidak ada keterangan daripada plaintif yang boleh menunjukkan bahawa isu Ops Spec tersebut telah diselesaikan semasa plaintif menerima cadangan jadual penerbangan daripada defendan.* Daripada fakta tersebut, bolehlah dibuat inferens bahawa plaintif tidak bersedia untuk menyediakan kapal terbang kepada
B defendan setelah LOU ditandatangani. Oleh itu, hujahan peguam defendan yang menyatakan bahawa kapal terbang P tidak berupaya untuk terbang setelah D menghantar cadangan jadual penerbangan adalah berasas dan perlulah diterima di atas imbangan kebarangkalian.

(emphasis added)

C **[47]** It is noted that the plaintiff's aircrafts were still under NESMA's Operation Specification (Ops Specs) at all material times, especially during the period of LOU. The defendant did not adduce any evidence to prove otherwise. The defendant ought to have adduce some evidence like calling NESMA but NESMA or its agents or employees was never called. The
D evidential burden lies on the defendant since it was the defendant which alleged that the plaintiff's aircrafts were or are being removed from NESMA's Ops Specs.

Whether The Plaintiff Has Proved Its Case And Losses?

E **[48]** The defendant in the LOU has agreed to the followings:

39.1 charter three (3) flights per month for KUL-JED-KUL which was supposed to begin on 10/02/2018 and end on 31/05/2018, whereby the Defendant agreed to pay the full amount of USD250,000 per return flight five (5) days in advance;

F 39.2 charter four (4) flights per month for KUL-CGK-KUL, which was supposed to begin on 10/02/2018 and end on 31/05/2018, whereby the Defendant agreed to pay the full amount of USD398,000 per return flight five (5) days in advance; and

39.3 agreed to drop all the legal charges and complaints to authorities, *ie*, MAVOM and DCA.

G **[49]** It is undisputed that the defendant did not charter any Umrah flights under the LOU, thus breaching the LOU. In the light of this, the plaintiff contended that they have suffered the loss of revenue amounting to USD1,982,000 per month.

H **[50]** The computation of the said sum of USD1,982,000 is as follows:

I

	Destination	No. of flights per month	Amount (USD)	Total (USD)
(a)	KUL-JED-KUL	3	250,000.00	750,000.00
(b)	KUL-CGK-KUL	4	308,000.00	1,232,000.00
			Total	**1,982,000.00**

[51] The plaintiff claimed a total loss of revenue from 10 February 2018 until 9 May 2018 is USD5,946,000 and the calculations are as follows:

	Period	Amount (USD)
(a)	10/02/2018 – 9/03/2018	1,982,000.00
(b)	10/03/2018 – 9/04/2018	1,982,000.00
(c)	10/04/2018 – 9/05/2018	1,982,000.00
	Total	**5,946,000.00**

[52] After reviewing the evidence adduced, we are of the considered opinion that the issue of the plaintiff mitigating its losses does not arise at all as the plaintiff cannot lease its aircraft to other companies as the same are contracted soley to NESMA/defendant. The approval to fly is only for NESMA/defendant.

[53] We are of considered view that from the foregoing, due to the defendant's failure to charter the flights between 10 February 2018 and 9 May 2018 under the LOU, the plaintiff has proved its losses of revenue in the sum of USD5,946,000.

[54] We find that the defendant had no intention of resuming the chartering of the Umrah flights, which is why the defendant did not send the flight schedule to NESMA. Further, when SD1 was cross-examined on the differences between the cost of chartering the plaintiff's aircraft and the cost of purchasing block tickets with other airline companies, SD1 had admitted that the cost of buying block tickets with MAS and/or AirAsia was way far cheaper than chartering the plaintiff's flights. This again proves that the defendant intentionally did not charter the plaintiff's aircraft for the Umrah from March 2018 to May 2018, to make more profit.

[55] Having perused the evidence, we are of the considered view that the plaintiff has proved its losses on a balance of probability, arising from the defendant's breach of the LOU. The plaintiff was not able to conduct any other businesses since the plaintiff's aircraft are under the NESMA's Ops

Specs. In addition to the plaintiff, suffering a loss of revenue, the plaintiff also had to bear the monthly fixed-costs for its aircraft, crew, maintenance, insurance, flight operation, ground operation and operating expenses even though the aircraft were not operating. This is substantiated by the testimony of SP1.

[56] From the testimony of SP1, we find that the plaintiff has proved its losses, on a balance of probabilities, by adducing documentary and oral testimony to prove that the plaintiff, at all material times, was ready and able to conduct the Umrah flight. SD1's evidence and the defendant's Summary of Air Ticket 2018 at PDF p. 105 of encl. 7 showed that the defendant intentionally did not charter the plaintiff's aircraft because the defendant did not have sufficient passengers. Arising from the defendant's breach, the plaintiff has suffered losses because the plaintiff could not enter into any other business contract as the plaintiff's AOC is registered under NESMA, and the plaintiff could not fly its aircraft until the end of LOU.

[57] Further, the defendant failed to adduce any evidence to rebut the plaintiff's case and show that the defendant was ready with 400 passengers to fly with the plaintiff. The only available evidence adduced by defendant is the defendant's Summary of Air Ticket 2018, which clearly showed that the defendant did not have sufficient passengers to charter the aircraft from the plaintiff. This proved that the defendant did not charter the plaintiff's aircraft so as to save costs, by utilising scheduled MAS and AirAsia commercial flights.

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[58] The defendant filed a counterclaim against the plaintiff, claiming a sum of USD6,582,000 as the cost of tickets from March 2018 until May 2018 and a sum of RM46,470.96 as the cost of promotion and advertisement for the Umrah packages. In addition, the defendant is also claiming loss of reputation and loss of income.

[59] From the evidence adduced, we are of the considered opinion that the defendant failed to plead its cause of action and further failed to plead the basis of its claims. The defendant merely pleaded that the defendant suffered losses due to the plaintiff's inability to conduct the flights.

[60] At the trial, the defendant pleaded or produced evidence to prove that the plaintiff has breached the LOU. The plaintiff on the other hand has adduced substantial evidence to prove that the plaintiff was able and ready to conduct the Umrah flights. The defendant failed to comply with the terms of the LOU, to charter aircrafts for Umrah flights, but the defendant secured seats with AirAsia or other commercial airlines.

[61] From the evidence adduced by the defendant in support of its counterclaim, the defendant showed that it has secured seats with other airlines, *ie*, AirAsia X and Malaysia Airlines, from March 2018 until May 2018. This can be seen in the defendant's Summary of Air Ticket 2018 at PDF p. 105 of encl. 7. The defendant produced its payment receipts of the airline companies, which can be seen in PDF pp. 106 to 152 and collectively marked as exh. D11. It is clear from the defendant's Summary of Air Ticket 2018 at PDF p. 105 of encl. 7 that the defendant had only incurred a cost of RM1,618,275 in bulk purchases for commercial flights, whereas, if the defendant were to charter the Umrah flight from the plaintiff, it would have paid a sum of USD5,946,000. The difference between the cost paid by the defendant for commercial flights and the cost it would have incurred if the defendant were to charter Umrah flights from the plaintiff is immense. It makes commercial sense for the defendant, not to charter aircrafts from the plaintiff.

[62] The defendant's evidence at PDF p. 105 of encl. 7 showed the followings:

(i) that the defendant did not have enough numbers of passengers, *ie*, 400, to take the Umrah flight with the plaintiff, as can be seen from the number of seats booked from March 2018 until May 2018; and

(ii) that the defendant has secured seats on commercial flights on 1 March 2018 and 3 March 2018, whereas the flight schedule sent to the plaintiff shows that the defendant proposed to start the flights only on 5 March 2018. This showed that the flight schedule, which was sent only as a cover-up to show that the defendant was complying with the LOU, but in actual fact, it did not intend to.

(iii) that is the reason why the emails were sent to only one person, *ie*, to SD2. The defendant showed no evidence that the defendant has sent to NESMA and requested NESMA to arrange the required flights. The defendant never explained why it did not send the request to NESMA, who is the correct party to instruct the plaintiff to fly.

[63] Since the defendant had secured seats on the commercial flights from March 2018 to May 2018, the defendant did not suffer any losses. The defendant's claim of USD6,582,000 is not supported by any credible evidence especially documentary evidence.

[64] We are in agreement with the plaintiff's contention that the various documents such as payment vouchers, invoices and bills produced by the defendant in support of their counterclaim were incurred before the execution of the LOU. The said advertisements, banners and hi-tea conducted to promote the Umrah flights were carried out, based on the earlier agreement between NESMA and the defendant. The plaintiff operated

the Umrah flights up until December 2017. Thus, the defendant's claim for the payments for various expenses which were incurred before the execution of the LOU, is wrong, incorrect and without basis.

[65] In any event, since the defendant's counterclaim was grounded on the plaintiff's breach of the LOU and in the light of our earlier finding that the plaintiff was not in breach of the LOU but the defendant, the defendant's counterclaim must fail.

[66] Having perused the evidence and the learned High Court Judge's grounds of judgment, we are in agreement with the pertinent paragraphs of the grounds of judgment in particular paras. [42], [44], [48], [49] and [50] which dealt with the consideration and dismissal of the defendant's counterclaim. In premises, we are of the view that the defendant has failed to prove its counterclaim.

[67] We did not find any appellate error which warranted any appellate intervention.

Conclusion

Appeal No. 1135

[68] In the light of our above findings, we are of the considered opinion that the learned High Court Judge made errors in material findings of facts in the plaintiff's claim which warranted appellate intervention. We are of the respectful view that there are merits in the plaintiff's appeal and we unanimously allow the appeal. We further award costs of RM10,000 subject to allocator to the plaintiff for this appeal.

[69] In the premises, we entered judgment against the defendant in favour of the plaintiff in the following terms:

(i) judgment is entered against the respondent in the sum of USD5,946,000 together with interest at the rate of 5% per annum from the date of judgment until the date of full and final payment;

(ii) the respondent hereby is ordered to withdraw complaints made to both the Department of Civil Aviation (DCA) and Malaysian Aviation Commission (MAVCOM); and

(iii) the respondent is ordered to refrain from making future complaints to the regulatory bodies in relation to the plaintiff's operation without the Extended Operation Certification (ETOPS).

Appeal No. 1173

[70] On the defendant's counterclaim, since the appeal by the plaintiff is allowed on the basis that the defendant has breached the LOU, the defendant's counterclaim which is premised on the plaintiff's breach of the LOU falls.

[71] In so far as the defendant's appeal against the dismissal of their counterclaim is concerned, we are of the considered view that the learned High Court Judge did not make any appellate errors to warrant appellate intervention. In the premises, we dismiss the defendant's appeal.

[72] The order of the learned High Court Judge dated 31 March 2021 dismissing the plaintiff's claim is varied accordingly whilst the order dismissing the defendant's counterclaim is affirmed.

[73] We further award costs of RM10,000 subject to allocator to the plaintiff for this appeal.